

Supreme Court, U.S.
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Supreme Court of the United States

WILLIAM DODD, JR., CLERK

OCTOBER TERM, 1978

No. 78-1055

FAIRCHILD INDUSTRIES, INC.,

Petitioner,

v.

HONORABLE ALEXANDER HARVEY, II,

Respondent.

**PETITIONER'S REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 33a-44a) is reported at 581 F.2d 1103. The oral opinion of the district court (Pet. App. 45a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1978. On October 19, 1978, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including December 31, 1978, "without prejudice to the Court's consideration of whether this application has been filed on time." The petition for a writ of certiorari was filed on December 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented are set forth in the petition for writ of certiorari filed in this matter on December 29, 1978 (Pet. 2-3).

STATEMENT OF THE CASE

Petitioner's statement of the case is set forth in the petition for writ of certiorari filed in this matter on December 29, 1978 (Pet. 3-10). As noted therein, (Pet. 10) on September 8, 1978, the grand jury indicted Petitioner and its chairman, Edward G. Uhl, on two counts of willfully filing false corporate income tax returns for the years 1971 and 1972, in violation of 26 U.S.C. § 7206. On February 7, 1979, the district court (Judge James R. Miller, Jr.) entered a judgment of acquittal as to both defendants on the false filing charges covering 1971 and 1972. The grand jury has not been discharged. However, Petitioner has no knowledge of whether the government is currently presenting evidence to the grand jury for the later years.

ARGUMENT

1. The Government has either ignored or misunderstood Petitioner's principal arguments. The mandamus proceeding was not directed, as the Government suggests, at preventing the IRS from misusing grand jury information in a civil proceeding. Rather it was aimed at compelling the District Court to hold an evidentiary hearing on charges of grand jury abuse by the IRS. Therefore the Government's contention that Petitioner has alternative remedies has no relevance in this case.¹ The cases relied on by the Government all involve mandamus actions brought to obtain evidentiary benefits for the moving parties. In such cases, it was appropriate for the Courts to consider whether the

Petitioner had another remedy to achieve the same benefits besides the extraordinary remedy of Mandamus.

But what alternative remedy is there to an evidentiary hearing on whether the integrity of the grand jury has been violated? The District Court in the instant case had a primary duty to protect the grand jury process. Its failure to make an inquiry on the basis of Petitioner's showing that the integrity of the grand jury was threatened amounted "to little less than an abdication of the judicial function . . ." clearly justifying the remedy of mandamus. *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). Under such circumstances the language of this Court's opinions, in *Schlagenhauf* and *LaBuy* does not permit a federal court to avoid the performance of its duty by pointing to possible alternative remedies for the Petitioner.

2. The government's attempt to minimize Petitioner's showing of probable grand jury abuse overlooks Petitioner's identification of specific IRS grand jury practices applicable to this case (Pet. 30-31) which are similar to ones found by the Department of Justice to be improper and ostensibly withdrawn by the IRS (Pet. 29-30). Also, the government ignores the plain meaning of the provisions of Internal Revenue Manual Supplement 9G-85, (Pet. 19-27; Pet. App. 2a) put into effect by the IRS during the pendency of the instant grand jury investigation and not disclosed by the government to Petitioner's counsel or the Court below. It is Petitioner's position that a fair reading of MS 9G-85 clearly reveals that the IRS has instituted procedures to permit it to effectively control grand jury investigations in criminal tax matters.

Petitioner submits that the IRS has adopted this grand jury strategy as a result of an erroneous

¹ As demonstrated in the petition, the remedies suggested by the government are also illusory in this case (Pet. 33-34).

interpretation of this Court's newly revised Federal Rule of Criminal Procedure 6(e). This Court sponsored the revision of Rule 6(e) to make it clear that an attorney for the government can disclose grand jury information to an IRS agent chosen by him to assist him in the grand jury investigation to enforce federal criminal law and for no other purpose. The IRS, however, has read the revision to permit it now to supervise and participate in grand jury investigations as an institution.

Petitioner's complaint that the IRS is effectively running many grand jury investigations is not speculative. It can reasonably be presumed that IRS personnel do follow Internal Revenue Manual directives. It does not suffice for the government to cite the language of statutory provisions and federal rules (Govt. Br. 9) restricting control over grand jury investigations and prosecution decisions to the Department of Justice. When the Department of Justice acquiesces in the implementation of the IRS Manual procedures in a grand jury investigation it has improperly delegated effective control over the investigation to the IRS.

3. The government has also misunderstood the petitioner's argument under *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). The point is simply that this Court held in *LaSalle* that the IRS cannot try its own prosecutions and must cease utilizing its investigative process, even for the civil side of the case, once it has referred the matter to the Department of Justice. The reason for this rule, the Court said, was to prevent the IRS from interfering with or augmenting the grand jury's investigation.

Petitioner contends that the present strategy of the IRS under MS 9G-85 is aimed at allowing the IRS to do exactly what this Court said it cannot do in *LaSalle*. The IRS is seeking as an institution under MS 9G-85 to

continue its investigation of a taxpayer after it has referred the case to the Department of Justice for a grand jury investigation. And although it is not using its own administrative summons process, the IRS is able through the grand jury's subpoena power, to question grand jury witnesses and examine grand jury documents in pursuit of its investigative purposes. It is submitted that this practice not only nullifies this Court's ruling in *LaSalle* but it represents an even greater invasion of the grand jury's functions.

Under this analysis, the *LaSalle* issue is raised only when the provisions of MS 9G-85 are implemented, and not when IRS agents simply give technical assistance to an attorney for the government in a grand jury investigation. In the latter case, the attorney for the government and not the IRS is running the investigation. However, under MS 9G-85 the IRS has conditioned the providing of technical assistance to attorneys for the government on the requirement that IRS supervisory and management personnel be included in the IRS grand jury team and that reports of grand jury information be made up the line to the District Director and Regional Counsel to permit the making of IRS prosecution decisions. In essence, the attorney for the government has the IRS, itself, as a partner in the investigation — not simply a few agents to give technical aide.

It is true, as the government states, that MS 9G-85 admonishes all the supervisory and top IRS officials permitted to receive grand jury information not to reveal this information to their colleagues at the IRS for civil purposes and to set up protective files. However, this Court held in *LaSalle* that the criminal and civil functions of the IRS are so intertwined that information barriers of this kind can not be expected to work. For this reason, this Court did not even permit the IRS to

continue its civil investigation once it had transferred its case to the Department of Justice.

4. Finally, the government has sought to dissuade this Court from granting certiorari in this case by erroneously conjuring up the threat of mini trials and the invasion of grand jury secrecy. These arguments are patently irrelevant in this case. This Court's opinions in *United States v. Calandra*, 414 U.S. 338 (1974), and *United States v. Dionisio*, 410 U.S. 1 (1973), frowning on the disruption of grand jury proceedings by mini trials, referred to the litigation of witness objections to grand jury evidence. These cases were never intended by this Court to discourage hearings on challenges to the very legitimacy of grand jury proceedings, as in the instant case. Also, the holding of an evidentiary hearing in this case would not disrupt the grand jury investigation or threaten to invade the secrecy of the grand jury. As Petitioner has emphasized in its petition to this Court, the inquiry at the evidentiary hearing would not be addressed to matters coming before the grand jury, but to how the grand jury investigation was initiated and who is supervising it. Such an inquiry can be made while the grand jury investigation continues, without interruption, and does not call for the revelation of any grand jury material that is protected by secrecy. The fact is that during the entire time these issues have been litigated in the courts below and on this Petition, the work of the grand jury has not been interrupted because of these proceedings.

Because the integrity of the judicial process is threatened by the grand jury abuse present here and because this Court's newly revised Federal Rule of Criminal Procedure 6(e) has been misinterpreted by the Department of Justice, the IRS, and the Courts below, it is imperative that this Court exercise its supervisory power to protect the grand jury process and to clarify the meaning of Rule 6(e).

CONCLUSION

For the above-stated reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on this 20th day of March, 1979, three copies of the foregoing Petitioner's Reply to Respondent's Brief in Opposition were mailed, postage prepaid, to Hon. Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530.

Samuel Dash